IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 34157

STATE OF IDAHO,	)	**2008 Unpublished Opinion No. 638**
	)	
Plaintiff-Respondent,	)	**Filed: September 10, 2008**
	)	
v.	)	**Stephen W. Kenyon, Clerk**
	)	
JOHN PAUL JONES, JR.,	)	**THIS IS AN UNPUBLISHED**
	)	**OPINION AND SHALL NOT**
Defendant-Appellant.	)	**BE CITED AS AUTHORITY**
	)	

Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. D. Duff McKee, District Judge.

Order of the district court on appeal from the magistrate division affirming conviction for violating Boise City Code, affirmed.

John Paul Jones, Jr., Sparks Nevada, pro se appellant.

Hon. Lawrence G. Wasden, Attorney General; Jennifer E. Birken, Deputy Attorney General, Boise, for respondent.

GUTIERREZ, Chief Judge

John Paul Jones, Jr. appeals from the district court's decision affirming his conviction by the magistrate for violating Boise City Code § 5-12-10E by placing his vending cart in an unapproved location. We affirm.

I.
FACTS AND PROCEDURE

After receiving a complaint from event organizers that Jones had placed his hot dog vending cart in a prohibited location and was blocking pedestrian traffic in downtown Boise, a Boise police officer approached him. The officer observed Jones and his daughter setting up their cart in an area approximately fifteen feet away from where another licensed vendor had already set up. Jones told the officer that when he had arrived, he had found his usual spot taken by a Wells Fargo Bank booth, the operators of which refused to show him their license, and Jones informed the officer that he would not leave the area until the officer issued him a citation.

The officer complied, giving Jones a citation that listed his offense as "Failure to Vend in an Approved Location" but failed to list a code section.

At the beginning of the bench trial, upon the magistrate's request, the state clarified that it intended to prove that Jones had violated Boise City Code § 5-12-10E by locating his vending cart less than fifty feet from another licensed vendor. It presented the court's copy of the citation upon which B.C.C. § 5-12-10 had been written in as the code section at issue. Following the court trial, the magistrate found Jones guilty of violating the aforementioned code section. Jones appealed his conviction to the district court, which affirmed. Jones now appeals.

II.
ANALYSIS

Our review of a decision of the district court, rendered in its appellate capacity, we review the decision of the district court directly. *State v. DeWitt*, 145 Idaho 709, 711, 184 P.3d 215, 217 (Ct. App. 2008). We examine the magistrate record to determine whether there is substantial and competent evidence to support the magistrate's findings of fact and whether the magistrate's conclusions of law follow from those findings. *Id*. If those findings are so supported and the conclusions follow therefrom and if the district court affirmed the magistrate's decision, we affirm the district court's decision as a matter of procedure. *Id.*

A. Due Process

Jones argues that his due process rights were violated when the state "injected substantially a new charge under BCC [sic] Section 5-12-10E." Specifically, Jones claims that because his copy of the citation described the charge as "failure to vend in approved location," he was prepared to defend against this charge and that the state's clarification of the charge at the commencement of trial (by specifying that it was pursuing a conviction under B.C.C. § 5-12-10E) was a variance which served to deprive him of "notice and his right to due process in [the] proceedings." The state responds that Jones failed to object at trial to any defect in the charging document or the state's clarification of it and thus, waived the right to challenge those issues on appeal. In the alternative, the state contends that the prosecution's actions at trial were merely a clarification of the charge allowed by Idaho caselaw and not a variance.

A variance involves either a difference between the allegations in the charging instrument and the proof adduced at trial or between the information and the jury instructions. *State v. Montoya*, 140 Idaho 160, 164-65, 90 P.3d 910, 914-15 (Ct. App. 2004). Neither scenario is what

occurred here--the violation alleged in the charging document (the citation) was "Failure to Vend in Approved Location" on both Jones's and the court's copy. The difference between the two was that on the court's copy, someone (apparently in the city attorney's office) had first written "18-704" in the space for the "Code Section" which was then crossed out and "BCC 5-12-10" was written below. It is this alteration that Jones objects to on appeal, not anything having to do with the proof offered at trial. In addition, given that this was a bench trial, there were no jury instructions. Accordingly, there is no "variance" issue.

And, even if we assume the issue of whether Jones was denied due process was preserved for appeal, we conclude his claim has no merit. Boise City Code § 5-12-10E provides that "[u]nless otherwise provided, mobile vending carts, trailers, or vehicles shall not be placed within fifty (50) feet of another mobile vending car, trailer, vehicle or Identified Vending Location." Idaho Misdemeanor Criminal Rule 3(d) provides that:

> The court may amend or permit to be amended any process or pleading at any time before the prosecution rests including the alleging of a lesser included offense, but no greater or different offense may be charged if substantial rights of the defendant are prejudiced.

Thus, even if we assume the addition of the Boise City Code section charged a greater or different offense than that alleged by the officer's initial indication on Jones's copy of the citation, Jones must still show that his substantial rights were prejudiced by the alteration. Jones argues that he was prejudiced because he had prepared to defend against a charge of "vending" in an unauthorized location by contending that he was not actually "vending" at the time his cart was located within fifty feet of the Wells Fargo booth. However, on appeal to the district court, his trial counsel asserted that he had come to trial prepared to defend against failure to vend in an approved location under B.C.C. § 5-12-10. Upon a review of that code section, the only plausible subsections that could have been implicated by a charge that Jones's cart was in an unauthorized location premised the violation on the location of the cart, without reference to whether the offender was actually "vending" at the time. Thus, Jones's decision to defend against the charge by arguing that Jones was not "vending" at the time his cart was located within fifty feet of the Wells Fargo booth was not a result of the state's addition of the code section at the start of trial, but rather Jones's interpretation of the statute, that one could be convicted under the ordinance only if they were actually "vending" at the time. Accordingly,

Jones's due process rights were not violated by the addition of the specific code section immediately prior to trial.

B. Statutory Interpretation

Jones contends that the word "placed" in B.C.C. § 5-12-10E "must be construed to be limited to apply to vendors while they are 'operating' or 'vending.'" He insists that the only reasonable interpretation of the word "placed" refers to "the locating by a vendor for the purpose of doing business" and that since he did not vend at the location where the violation occurred, he did not violate section 5-12-10E.

This Court exercises free review over the application and construction of statutes. *State v. Reyes*, 139 Idaho 502, 505, 80 P.3d 1103, 1106 (Ct. App. 2003). Where the language of a statute is plain and unambiguous, this Court must give effect to the statute as written, without engaging in statutory construction. *State v. Rhode*, 133 Idaho 459, 462, 988 P.2d 685, 688 (1999); *State v. Burnight*, 132 Idaho 654, 659, 978 P.2d 214, 219 (1999); *State v. Escobar*, 134 Idaho 387, 389, 3 P.3d 65, 67 (Ct. App. 2000). The language of the statute is to be given its plain, obvious, and rational meaning. *Burnight*, 132 Idaho at 659, 978 P.2d at 219. If the language is clear and unambiguous, there is no occasion for the court to resort to legislative history or rules of statutory interpretation. *Escobar*, 134 Idaho at 389, 3 P.3d at 67. When this Court must engage in statutory construction, it has the duty to ascertain the legislative intent and give effect to that intent. *Rhode*, 133 Idaho at 462, 988 P.2d at 688. To ascertain the intent of the legislature, not only must the literal words of the statute be examined, but also the context of those words, the public policy behind the statute, and its legislative history. *Id.* It is incumbent upon a court to give a statute an interpretation which will not render it a nullity. *State v. Beard*, 135 Idaho 641, 646, 22 P.3d 116, 121 (Ct. App. 2001). Constructions of a statute that would lead to an absurd result are disfavored. *State v. Doe*, 140 Idaho 271, 275, 92 P.3d 521, 525 (2004); *State v. Yager*, 139 Idaho 680, 690, 85 P.3d 656, 666 (2004).

We agree with the state that the plain and unambiguous language of the ordinance provides that to prove a violation, the prosecution must only show that Jones put his cart within fifty feet of another identified vending location, without reference to whether he had actually begun to sell his products. It is clear that the obvious meaning of the statute turns on where the cart is located, not on whether the cart operator is vending. Jones's argument that "placed" must be interpreted as "vending" is not supported by the plain language of the statute, which we are

constrained to. It is not difficult to see why the legislature chose such wording--a cart operator need not actually be actively selling his wares in order to cause the ills the statute seeks to protect against, such as the blockage of pedestrian traffic. Having a cart operator move before setting up and vending also makes less work for the cart operator. Additionally, Jones's argument that such an interpretation would criminalize the conduct of merely pushing one's cart past another vendor is not compelling. The nature of the word "placed" implies at least some sense of permanency that would not be present in the hypothetical that Jones proposes.

Accordingly, we hold the district court did not err in upholding the magistrate's conclusion that a violation of the ordinance required only that a cart be located less than fifty feet from another properly located vendor, as opposed to requiring that the operator actually be engaged in commerce at the time.[1]

C. Sufficiency of the Evidence

Jones argues that there was insufficient evidence presented that he violated the code section, as opposed to merely "protesting" the fact that another vendor was in "his" spot and that the vendor failed to display a license. Appellate review of the sufficiency of the evidence is limited in scope. The standard of review is whether, when viewed in the light most favorable to the prosecution, there is substantial evidence upon which any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Grazian*, 144 Idaho 510, 513, 164 P.3d 790, 793 (2007); *State v. Young*, 138 Idaho 370, 372, 64 P.3d 296, 298 (2002). Evidence is sufficient to support a verdict where there is substantial, even if conflicting, evidence meeting the above standard. *State v. Thomas*, 133 Idaho 172, 174, 983 P.2d 245, 247 (Ct. App. 1999).

Given our affirmance above of the district court's interpretation of the ordinance at issue, Jones's argument that he was not "vending" in the spot is irrelevant. As the district court pointed out, the statute prohibits "placing" a cart within fifty feet of another cart, without reference to

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[1] When upholding the magistrate on this issue, it appears that the district court analyzed the issue in terms of whether Jones was "vending" such that he was in violation of the statute. To the extent the district court based its decision on this finding, we conclude it was erroneous since whether Jones was actually "vending" at the time is irrelevant to whether he violated the ordinance. However, we need not reverse the district court, because where a ruling in a criminal case is correct, though based upon an incorrect reason, it still may be sustained upon the proper legal theory. *State v. Pierce*, 107 Idaho 96, 102, 685 P.2d 837, 843 (Ct. App. 1984).

whether the offender is actually "vending" from his cart. There was no dispute here that Jones "placed" his cart within fifty feet of the Wells Fargo booth--he admitted as much at trial. His conduct in doing so violates the statute regardless of the intent behind his actions. Accordingly, we conclude there was sufficient evidence to support Jones's conviction under the ordinance.

D. Constitutionality of the Statute

Jones argues that the application of B.C.C. § 5-12-10E so as to prohibit him from temporarily stopping in transit a place within fifty (50) feet of another vendor in order to protest a matter and obtain a citation, with the full intent of moving on, is a violation of his right to free speech. He goes on to explain his argument as alleging that the statute is unconstitutionally overbroad.

The state first responds by alleging that because Jones raised the issue for the first time on appeal to the district court, it is waived on appeal. Generally, issues not raised in the trial court may not be considered for the first time on appeal. *State v. Fodge*, 121 Idaho 192, 195, 824 P.2d 123, 126 (1992). However, we may consider fundamental error in a criminal case, even though no objection was made at trial. *State v. Rozajewski*, 130 Idaho 644, 645, 945 P.2d 1390, 1391 (Ct. App. 1997). Fundamental error has been defined as error which goes to the foundation or basis of a defendant's rights, goes to the foundation of the case or takes from the defendant a right which was essential to his or her defense and which no court could or ought to permit to be waived. *State v. Babb*, 125 Idaho 934, 940, 877 P.2d 905, 911 (1994). This Court has specifically held that it does not amount to fundamental error to allow a defendant to waive a challenge that a statute is overbroad as applied. *State v. Hollon*, 136 Idaho 499, 503, 36 P.3d 1287, 1291 (Ct. App. 2001).

Here, there is no evidence on the record that Jones argued to the magistrate that the code section was unconstitutionally overbroad as it applied to him. Accordingly, since this Court has previously held that this is not a fundamental error, the issue is waived on appeal, and we do not address the merits of his contention.

III.
CONCLUSION

The prosecution's insertion of the code section upon which it was pursuing Jones's conviction was not a variance; nor did it deprive Jones of his due process rights. The plain language of Boise City Code § 5-12-10E criminalizes the mere "placing" of a vending cart

within fifty feet of another vendor, without reference to whether the offender was actually vending at the time. Under this interpretation of the statute, there was sufficient evidence presented at trial that Jones violated the ordinance by placing his cart within fifty feet of the Wells Fargo booth. Finally, we conclude that Jones waived his contention that B.C.C. § 5-12-10E is constitutionally overbroad, because he did not raise the issue before the magistrate.

Judge LANSING and Judge PERRY **CONCUR**.